U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-E-, INC.

DATE: JULY 20, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of wholesale and retail merchandise, seeks to permanently employ the Beneficiary as a marketing analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

On May 12, 2011, the Acting Director, Texas Service Center, denied the petition. The Acting Director concluded that the record did not establish the Beneficiary's possession of the educational qualifications for the offered position.

The matter is now before us on *de novo* appellate review. Because the Petitioner did not respond to our most recent notice of intent to dismiss, we will summarily dismiss the appeal as abandoned. The record also contains substantial evidence that the Petitioner willfully misrepresented a material fact on the accompanying labor certification. We will therefore invalidate the labor certification.

I. LAW AND ANALYSIS

A. The Petitioner Did Not Respond to Our Most Recent Notice of Intent to Dismiss

In response to a request for evidence or notice of intent to deny, a petitioner may submit a complete response, a partial response, or withdraw a petition. 8 C.F.R. § 103.2(b)(11). If a petitioner does not respond to a request for evidence or a notice of intent to deny by the required date, we may summarily deny a petition as abandoned. 8 C.F.R. § 103.2(b)(13)(i). We may also deny a petition if a petitioner does not submit requested evidence that precludes a material line of inquiry. 8 C.F.R. § 103.2(b)(14).

In the instant case, on June 11, 2015, we mailed a notice of intent to dismiss and a notice of derogatory information (NOID) to the Petitioner. Because the record did not establish the Beneficiary's qualifying experience for the offered position or the *bona fides* of the job opportunity, the NOID informed the Petitioner of our intention to dismiss the appeal. The Petitioner had 33 days in which to respond to the NOID. *See* 8 C.F.R. §§ 103.2(b)(8)(iv), 103.8(b) (stating 30 days as the

maximum time in which to respond to a notice of intent to deny and adding 3 days to deadlines for notices served by mail).

We mailed our NOID to the Petitioner, with a copy to counsel. Our NOID was addressed to the Petitioner at the address it provided on the Form I-140, Immigrant Petition for Alien Worker. The Form G-28, Entry of Appearance, submitted by counsel, stated the same address for the Petitioner.

On June 30, 2015, the U.S. Postal Service returned our NOID to the Petitioner as undeliverable.[1] The copy of the NOID that we mailed to counsel was not returned to us. As of the date of this decision, we have not received a response to the NOID.

The record indicates that the Petitioner did not respond to our NOID by the required date. Pursuant to 8 C.F.R. § 103.2(b)(13)(i), we will therefore summarily dismiss the appeal.

B. The Record Contains Substantial Evidence That the Petitioner Willfully Misrepresented a Material Fact on the Accompanying Labor Certification

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A delegation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). We may invalidate a labor certification after its issuance upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification application." 20 C.F.R. § 656.30(d).

A willful misrepresentation of a material fact must be deliberate and voluntary, made with knowledge of its falsity. *Witter v. INS*, 113 F.3d 549, 554 (5th Cir. 1997) (citations omitted). A misrepresentation is material if it had a natural tendency to influence the government's decision. *Id.* (citing *Kungys v. United States*, 485 U.S. 759, 772 (1988)).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), accompanies the petition. By signing the labor certification, the Petitioner certified that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8).

The provision at 20 C.F.R. § 656.10(c)(8) "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*) (referring to the identical regulation at former 20 C.F.R. 656.20(c)(8)).

[1] Online records indicate the forfeiture of the Petitioner's state business registration. *See* Tex. Office of the Controller, Franchise Tax Account Status, at https://mycpa.cpa.state.tx.us/coa/Index.html (accessed June 21, 2016). The Petitioner may therefore no longer conduct business from the address.

> Where the alien for whom labor certification is sought is in a position to control hiring decisions or where the alien has such a dominant role in, or close personal relationship with, the sponsoring employer's business that it would be unlikely that the alien would be replaced by a qualified U.S. applicant, the question arises whether the employer has a *bona fide* job opportunity.

Id.

Thus, if the offered position was not clearly open to U.S. workers, the Petitioner misrepresented a material fact involving the accompanying labor certification.

To determine the *bona fides* of the job opportunity, we must consider multiple factors, including but not limited to, whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to corporate directors, officers, or employees; incorporated or founded a company; has an ownership interest in it; is involved in its management; sits on its board of directors; is one of a small group of employees; and has qualifications matching specialized or unusual job duties or requirements stated on an accompanying labor certification. *Modular Container*, 1991 WL 223955 at *8. We must also consider whether a foreign national's pervasive presence and personal attributes would likely cause a petitioner to cease operations in the foreign national's absence and whether the employer complied with DOL regulations and otherwise acted in good faith. *Id.*

In the instant case, several *Modular Container* factors indicate that the offered position was not clearly open to U.S. workers. As indicated in our most recent NOID, the record identifies the Beneficiary as a founder and director of the Petitioner. In a June 16, 2008, letter in support of a nonimmigrant visa petition for the Beneficiary, the Petitioner's secretary stated that the Petitioner's parent company sent the Beneficiary to the United States in 2007 to create the company as its president. In a June 19, 2012, letter in support of a later nonimmigrant visa petition, the Petitioner's secretary stated that the Beneficiary served as company president in 2007 and 2008, and that it wanted to employ him again in that position.

The Petitioner also submitted copies of numerous documents identifying the Beneficiary as its corporate director. An amendment to its articles of incorporation, dated August 20, 2007, identify the Beneficiary as one of the company's two directors. A certificate of amendment filed about 8 months later identifies the Beneficiary as the Petitioner's sole director and registered agent. An organizational chart also places the Beneficiary in the company's highest position as director. The Petitioner's federal income tax returns indicate its payment of officer compensation to the Beneficiary in 2007 and 2008.[2] The Beneficiary also appears to have signed the tax returns and other documents of record as the company's director.

[2] Copies of the Petitioner's tax returns for following years do not identify the recipient(s) of officer compensation. But IRS Forms W-2, Wage and Tax Statements, of record indicate that the Beneficiary's wages match the corresponding amounts of officer compensation in 2010, 2011, and 2012.

The Beneficiary's positions as president and director of the Petitioner indicate his involvement in the company's management and his ability to control or influence hiring decisions regarding the offered position. The record also identifies the Beneficiary as a member of a small group of employees. Copies of IRS Forms W-2 submitted by the Petitioner indicate its employment of six people in 2010 and 2011, and eight people in 2012.

In addition, the record indicates the Beneficiary's familial relationship to another employee of the Petitioner. The organizational chart, IRS Forms W-2, and U.S. Citizenship and Immigration Services (USCIS) records identify a co-worker of the Beneficiary as his wife.

The record does not indicate that the Beneficiary has an ownership interest in the Petitioner or qualifications matching specialized or unusual job duties. The record is also unclear whether his absence from the company would likely cause it to cease operations. But the record identifies the Beneficiary as a founder and director of the Petitioner, indicating his involvement in the company's management and his ability to control or influence hiring decisions. The record also indicates his membership in a small group of employees and his familial relationship to another employee. A majority of the *Modular Container* factors therefore indicate that the offered position was not clearly open to U.S. workers.

Because the job opportunity was not clearly *bona fide*, the record indicates that the Petitioner misrepresented the availability of the position to U.S. workers on the accompanying labor certification. The misrepresentation was material because an employer must attest to the *bona fides* of a job opportunity to obtain labor certification approval. *See* 20 C.F.R. § 656.10(c)(8).

The record also indicates that the Petitioner knowingly made the misrepresentation. The officers and principals of a corporation are presumed to be aware and informed of the organization and staff of its enterprise. *Matter of Silver Dragon Chinese Rest.*, 19 I&N Dec. 401, 404 (Comm'r 1986). The Petitioner's secretary, who signed the labor certification, therefore presumably knew that the Beneficiary was a company founder and director who was involved in its management and had the ability to control or influence hiring decisions. Moreover, in nonimmigrant visa petitions, the Petitioner's secretary informed USCIS of the relationships between itself and the Beneficiary.

The record contains substantial evidence of the Petitioner's willful misrepresentation of a material fact involving the accompanying labor certification. Pursuant to 20 C.F.R. § 656.30(d), we will therefore invalidate the labor certification.

II. CONCLUSION

The Petitioner did not respond to our most recent NOID by the required date. We will therefore summarily dismiss the appeal. The record also contains substantial evidence that the Petitioner willfully misrepresented a material fact on the accompanying labor certification. We will therefore invalidate the labor certification.

A petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is summarily dismissed as abandoned pursuant to 8 C.F.R. § 103.2(b)(13).

FURTHER ORDER: The approval of the ETA Form 9089, case number [redacted] is invalidated under 20 C.F.R. § 656.31(d), based on the Petitioner's willful misrepresentation of a material fact.

Cite as *Matter of C-E-, Inc.*, ID# 14602 (AAO July 20, 2016)